

2011 WL 8088399 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Sherrie KRAMER and Philip Kramer, Plaintiff(s),

v.

ALLSTATE INSURANCE COMPANY, Rosalinda Murphy and Does 1 through 50, inclusive, Defendants.

No. 2:11-CV-07079-GAF (FFM).
December 22, 2011.

**Plaintiffs' Opposition to Defendants' Motion to Dismiss the
Third Cause of Action from the Third Amended Complaint**

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Judge: Hon. Gary A. Feess.

Related Case LASC Case No: BC453530

DEPT: Courtroom 740

Date: January 23, 2012

Time: 9:30 a.m.

CTRM: 740

DATE ACTION FILED: 08/26/11

Trial Date: None Set

PLAINTIFF HEREBY OPPOSES TO PORTIONS OF DEFENDANTS' MOTION TO STRIKE AS FOLLOWS:

This action arises out of a dispute over the manner in which the Defendants mishandled the insurance claims tendered by Plaintiffs under the terms of their homeowner policy. Contrary to the assertions of Defendant, Plaintiff has not been given "three bites at the apple." Plaintiffs filed their Original Form Complaint in Pro Per in State Court, The First Amended Complaint was also filed in State Court and had inadequately pled a cause of action against the adjustor Rosalinda Murphy. The Second Amended Complaint was filed with allegations of **Elder Abuse** specifically aimed at her. The Court dismissed Ms. Murphy and gave the Plaintiff leave to state a Cause of Action for **Elder Abuse** against Allstate itself.

Plaintiffs disagree that this case involves a "legitimate dispute" as to coverage but rather is about outrageous bad faith actions of an insurance company attempting to deprive an **elderly** couple of insurance benefits that they paid for because they needed to be able to repair their home and either replace or repair their personal property. Defendant denied the benefits, with intent to deprive the couple of vested financial rights, to indemnity for the loss as alleged in the Complaint.

Plaintiff agrees with Defense that there should not be a Fourth Amended Complaint and Plaintiff is comfortable that a cause of action for **elder abuse** has been pled against Defendant under the laws of the State of [California Welfare and Institutions Code §15610.30\(a\) \(1\)-\(2\) 3\(b\) and \(b\) \(1\)-\(2\)](#).

NOTICE PLEADING

Part of Defendant's ground for the request for dismissal is the fact that the specific Welfare and Institutions Code sections are not referred to in the pleadings. However, this is not adequate grounds as the Federal Rules provide for "notice pleading". The pleadings need not allege facts constituting the claim for relief or defense. They need only give fair notice of the pleader's claim for relief or defense so the opposing part can respond (see [Conley v. Gibson \(1957\) 356 US 41, 45-46](#)).

Further Plaintiff's Third Amended Complaint complies with FRCP 89 (e)(1) in that "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required".

UNDER THE LAW OF THE STATE OF CALIFORNIA CAN AN INSURANCE CARRIER BE LIABLE FOR **ELDER ABUSE**?

The ultimate question here is a legal question; can an Insurance Carrier be liable to an **elderly** plaintiff for **elder abuse**? Plaintiffs have alleged they can be held under the provisions prohibiting "financial" **abuse** under the California Welfare and Institutions Code. Defendant has not directly addressed this issue and has not provided any case law that indicates that the California Welfare and Institutions Code does not apply to Insurance Carriers who intentionally and wrongfully take steps to deprive duly owed insurance benefits to the **elderly**.

Defendants have quoted portions of the code but have cleverly avoided the portions of the Code that are at issue. First, the clearly and often repeated statement of legislative intent is to protect "**Elders**" from various forms of **abuse**. Although there are several Civil Code sections which touch the subject, the simplicity of Penal Code Section 2950 says it best.

(a) It is the intent of the Legislature to do all of the following:

- (1) Reduce the incidence of financial **abuse** perpetrated against mentally impaired **elder** adults.
- (2) Minimize monetary losses to mentally impaired **elder** adults as a result of financial **abuse**. (Balance Omitted)

The second section of Welfare and Institutions Code [§15610.30](#) establishes financial **abuse** of an "**elder**". In that section an "**elder**" is anyone over 65 years of age. If you would look directly to the language of [Welfare & Institutions Code §15610.30](#), it states in part:

(a) "Financial **abuse**" of an **elder** or dependent adult occurs when a person or entity does any of the following:

- (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.
- (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.
- (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** or dependent adult by undue influence, as defined in [Section 1575 of the Civil Code](#).

. . . . (Balance omitted)”

To paraphrase:

“Financial **abuse**” occurs when a . . . entity . . . takes . . . retains . . . personal property of an “**elder** ... for a wrongful use . . .”

Or when ... “... appropriates, obtains, or retains, or assists in ..., appropriating, obtaining, or retaining . . . personal property of an **elder** . . .” Note the language here:

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult.”

The language of the code is specifically inclusive not exclusive.

Plaintiffs have specifically pled that Allstate deliberately delayed benefits, have used incompetent vendors, actively authorized mitigation efforts and then refused to pay, performed in such a way as to force the couple from their home and invade their retirement savings, and they clearly used the distress of the couple as a bargaining chip to obtain a below value settlement. The companies misrepresentations to Plaintiffs are also specifically pled.

In part the damages resulted from the failure to adequately and accurately explain the various coverages. In part, this resulted from the willful withholding of benefits Allstate knew to be owing, and was aggravated when Allstate used an incompetent vendor who delayed the process and created additional damage in the process. It was also aggravated by Allstate's various misrepresentations to the Plaintiffs. It would seem that this kind of conduct would be financial **Elder Abuse** unless there was a specific finding that California **Elder Abuse** law for some inexplicable reason just does not apply to insurance companies or their adjusters.

Looking to California Case law there are a dearth of cases on this issue. The most prominent is *Moroney v. Am. Int'l Group (In re Bacon)*, 415 F. Supp. 2d 1027, 1031 (C.D. Cal. 2006). The Court denied an insurer's motion to dismiss where plaintiff's complaint “is not based on the argument that the sale of annuities to seniors was illegal per se, but, rather, is based on ‘defendants’ false and misleading statements, negligence and breach of fiduciary duty in connection with the sales of deferred annuities’”. In the instant case there are just such false and misleading statements, negligence and breach of fiduciary duty in connection with the handling of this claim.

In the *Estate of Migliaccio v. Midland Nat'l Life Ins. Co.*, 436 F. Supp. 2d 1095 gives some insight on the issue although it is not predicated on the Welfare & Intuitions Code, the Court stated:

Following the reasoning articulated in *Bacon*, the Court concludes that annuities do not fall within the ambit of the CLRA. The Court is persuaded by Bacon that plaintiffs' reliance on *Kagan* and *Massachusetts Mutual* is unavailing. See 415 F. Supp. 2d at 1036. The Court has located no subsequent authority which calls into question the California Supreme Court's dicta in *Civil Services Employees* stating that an annuity is neither “good” nor “service” within the meaning of the CLRA. In sum, like *Bacon*, the Court finds that Civil Services Employees remains the strongest indication [**36] of how the California Supreme Court's would resolve this issue. **Therefore, to the extent plaintiffs' CLRA claim is predicated on defendants' sale of annuities - as distinct from their providing estate or financial planning - such a claim cannot lie**, [Emphasis supplied] The Court thus GRANTS defendants' motion to dismiss plaintiffs' UCL claim only insofar as it is premised on defendants' sale of annuities under the CLRA. Defendants' alternative motion to strike plaintiffs' CLRA allegations is therefore DENIED as moot. [Emphasis supplied] *Estate of Migliaccio v. Midland Nat'l Life Ins. Co.*, 436 F. Supp. 2d 109d5.

Claims handling is a service. Service is the term used to describe what an insurance carrier does when they appear at the home of the insured and tell them what to do about the claim and advise them as to what is covered or not covered. In this case the carrier went even farther in that they brought in their own vendors and adjusters to service the claim. What is at issue here is not the sale of the policy such as a case where the insured claims that an inadequate policy was sold but the actual acts of adjusting the claim and the misrepresentations related to those acts. What is at issue here is the willingness of the carrier to use unethical bad faith tactics to obtain a below value settlement with their insured.

CONCLUSION

By both legislative intent and the only available dicta from the California State Courts it appears that any Insurance Company that attempts to wrongfully deny benefits to the **Elderly** by misrepresentation and the others actions involved in this case, has violated the intent of the Welfare and Intuitions Code and is liable for **Elder Abuse**.

Dated: December 22, 2011

Matison, Margolese & Korn, ALC

By <<signature>>

Vana Parker Margolese

Attorneys for Plaintiffs

Philip and Sherrie Kramer

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